STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 29, 2005
v	No. 254488 Wayne Circuit Court
MILTON ANTHONY JACKSON, Defendant-Appellant.	LC No. 03-012937-01

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for felon in possession of a firearm, MCL 750.224f, possession of a loaded firearm in a vehicle, MCL 750.227c, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Police officers responded to a call and were flagged down by an individual who maintained that someone with a gun was chasing him. As the officers spoke to complainant, a gray van turned onto the street and complainant, a minor, indicated that his pursuer was in the van. The police stopped defendant's vehicle and found a loaded shotgun in the passenger seat. Defendant and complainant had a brief argument, and defendant was arrested. Defendant waived his *Miranda*[1] rights, and admitted both that he had possessed the weapon for two months and that he had possessed it in the vehicle. Defendant stated that he had taken the gun from his home because complainant had tried to threaten him with it.

Defendant presented the testimony of complainant's mother. She described complainant as a "dramatic" child who had had numerous encounters with the juvenile system and had had mental evaluations. She and defendant had gotten into a "tusseling" or "wrestling" match over keys, and complainant appeared with the loaded gun and threatened defendant. Defendant took the weapon from complainant. Complainant subsequently left the home, and defendant followed him to attempt to return him to the home. During his search for complainant, defendant circled the area several times. Complainant's mother indicated that defendant took the gun with him to keep it away from the seven other small children in the home.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant did not testify at trial. The record contains no discussion of his decision not to testify. However, defense counsel stipulated to a number of facts, including that defendant was ineligible to possess a weapon. Defense counsel also conceded during closing argument that defendant possessed the weapon in the vehicle. Defense counsel argued that defendant brought the weapon in the car with him in order to keep it away from the seven other children in the home and thus did not act with criminal intent.

The trial court found that, although defendant acted correctly when he took the firearm from complainant, he was not justified in taking it with him while he tried to locate complainant. The trial court noted that defendant admitted to police that he possessed the gun for a number of months prior to the incident. The trial court found defendant guilty of all charges.

In his comments to the probation department before sentencing, defendant apparently stated that he was taking the gun to the police station when he left the house. Defense counsel stated that he may have somehow placed a suggestion to this effect in a comment to defendant, but maintained that defendant had never told him what he intended to do with the gun.

On appeal, defendant argues that trial counsel provided ineffective assistance by failing to call him as a witness on his own behalf, and by failing to present authority to support his position at trial that he was not guilty of the offenses because he intended to deliver the weapon to the police at the earliest possible time. See *People v Coffey*, 153 Mich App 311, 314-316; 395 NW2d 250 (1986). Defendant maintains that had he been allowed to testify, the trial court would have found him not guilty. We disagree.

This issue is not preserved for appeal because defendant failed to move for a new trial or a *Ginther*[2] hearing. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991). We may review this issue where the record is sufficiently detailed to support defendant's claim even where defendant fails to move for a new trial or a *Ginther* hearing. *Id*. at 74. However, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, and constitutional questions are reviewed de novo. *Id*. To establish ineffective assistance of counsel, a defendant must show that counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant must overcome the strong presumption that the attorney's action constituted sound trial strategy. *Id*. To show prejudice, the defendant must establish a reasonable probability that the result of the proceeding would have been different if not for counsel's errors. *Id*. at 302-303.

Defendant's claims fail for a number of reasons. First, this Court has recently found that *Coffey, supra*, no longer remains good law, in light of our Supreme Court's decision in *People v*

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Pasha, 466 Mich 378; 645 NW2d 275 (2002). See *People v Hernandez-Garcia*, 266 Mich App 416; 701 NW2d 191 (2005). And it is well settled that counsel is not required to advocate a meritless position. *Snider*, *supra* at 425. Second, defense counsel stated that defendant had not told him that he planned to take the gun to police, and indicated that counsel may have suggested this line of defense. We agree with the prosecutor's argument that counsel is not required to be clairvoyant. In addition, defendant has not presented any record evidence to support his claim that counsel prevented him from testifying on his own behalf. Moreover, defendant's claim directly contradicts the testimony of his witness, as well as his trial defense, which was based on a claim that he took the gun from the home in order to keep it from the other children. Finally, we note that defendant's conviction for felon in possession of a firearm, which formed the predicate offense for the felony-firearm conviction,[3] could be supported solely by the fact that he admittedly possessed the weapon for a number of months prior to this incident, a fact noted by the trial court. MCL 750.224f(2). For these reasons, we conclude that defendant has failed to demonstrate outcome-determinative error on the part of trial counsel.

We affirm.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Pat M. Donofrio

[3] Possession of a loaded firearm in a vehicle is a misdemeanor. MCL 750.227c.